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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA BUFFINGTON, *et al.*,
Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This reply brief is submitted on behalf of the petitioners in order to correct the most serious misstatements and distortions of issues in respondents' Brief in Opposition ("Opp.").

I. THE COURT BELOW WRONGLY ENGAGED IN *DE NOVO* FACT-FINDING

A. The Court Erred In Finding A Policy And Practice Of Handcuffing Suicidal Detainees To The Booking Desk

In an effort to paper over the extensive *de novo* fact-finding of the Court of Appeals, respondents repeatedly assert that the decision below was factually correct. (Opp.

6, 7, 11). This assertion is false. Its falsity is apparent from a simple comparison of the trial transcript references (Pet. 19-21) and the opinion of the Court of Appeals. Nine witnesses at trial either flatly denied or did not know of a purported policy or custom to handcuff suicidal detainees to the front desk. *Id.* Notwithstanding the utmost respect and deference that should be given to jury awards,[1] the Court of Appeals made a *de novo* finding that the County in fact did have a policy and custom of handcuffing suicidal detainees to the front desk (Pet. 17, 18).

Respondents seek to support this *de novo* finding by providing references to the testimony of eight witnesses (Opp. n.2). Respondents fail to mention that out of these eight witnesses, four of them (Yuska, Gribbin, Maeser and Harvey) provided *contradictory* testimony on this point.[2] Obviously, it is not the role of a court of appeals to weigh conflicting testimony. This task is exclusively within the province of the jury.

Incredibly, respondents rely upon Officer Gaigalas, an admitted perjurer, to further undergird the Court of Appeal's finding as to policy and custom (Opp. 3). At trial, Officer Gaigalas confessed to perjury. Gaigalas testified as follows:

> Q. In the course of and throughout your deposition last July, you testified to the effect that you had no prior knowledge that Jim Buffington was suicidal or

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[1] *E.g., Parker v. District of Columbia*, 850 F.2d 708, 711 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 1339 (1989).

[2] Apx. 1205-06 (Yuska *denied* that he promulgated "standard procedures or policies," he merely stated that it was "*my* practice, which was a good habit *of mine*," and stated "[i]t's not a policy or something written in rules and regulations"); Apx. 1301 (Gribbin stated that "it was not a blanket statement that was . . . attributed to the entire station"); Apx. 1367 (Maeser stated: "I would not say policy"); Apx. 1161 (Harvey said: "[i]t's not an order," and "I wouldn't even call it a policy.").

that he was being held for emergency psychiatric evaluation before you placed him into the lockup, correct?

A. Yes, sir.

Q. Your testimony in that regard was false, was it not?

A. Yes, it was.

Q. It was deliberately and knowingly false, wasn't it?

A. Yes, sir.

Apx. 1406. This case thus presents an especially extreme example of why appellate courts are not permitted to assess the credibility of witnesses. The credibility of virtually every police officer was called into question, and it was the exclusive role of the jury to sort out the conflicting testimony.

Testimony concerning a "policy" to properly monitor suicidal detainees, to the extent that it was credited by the jury, provided support to plaintiffs' theory of the case. The jury could have found this was a "policy" that either did not exist or was never enforced. The failure to enforce the policy could have been regarded as proof of an unconstitutional custom. Regardless of whether it actually existed, or whether it can accurately be portrayed as a "policy," it is clear that every officer testifying on this subject necessarily acknowledged that they frequently encountered the problem of suicidal detainees, and that the very nature of the problem was a matter of life or death. The chronic nature of this problem was proof of the County's deliberate indifference within the meaning of the *City of Canton v. Harris*, 489 U.S. 378 (1989).

Even if an informal policy did exist, and even if this testimony had been undisputed at trial, there still would be no basis for the Court of Appeals to find an absence

of causation. It flatly ignores the evidence as to Chief Behan's failure to punish Officers Gaigalas and Tucker for violation of the purported policy; and further ignores the testimony as to numerous prior suicide episodes. If such a policy can be said to exist, it was clearly honored in the breach. As recognized by the Sixth Circuit, a policymaker's "failure to supervise and correct the situation in view of the numerous similar incidents and his failure to subsequently punish the responsible individuals is more than sufficient evidence of a policy or custom to render the County liable . . . ." *Leach v. Shelby County Sheriff*, 871 F.2d 1241, 1248 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 2173 (1990).

Respondents falsely state that the Fourth Circuit "canvassed the evidence petitioners marshalled concerning . . . lack of disciplinary actions." (Opp. 7). In fact, the Fourth Circuit's opinion does not mention a single word concerning the lack of punishment and the systemic lack of discipline. Such evidence was wholly disregarded notwithstanding the fact that such evidence in and of itself was sufficient to support the finding of municipal liability (Pet. 22, 24).

The bottom line analysis is that the jury was told that within the Baltimore County Police Department, "there is no such thing as informal policy," (Apx. 1544) and that an officer is immune from disciplinary action unless he violates a *written* Departmental rule or regulation. (Apx. 1972-73).

The Buffiingtons do not contend that the Due Process Clause requires every police department in the nation to adopt and adhere to a *written* regulation saying that openly suicidal detainees must be constantly observed. However, if a police department (like Baltimore County) is institutionally organized so that discipline is impossible unless a *written* rule is broken, it is abundantly clear, under these circumstances, that a written regulation is the only meaningful method for ensuring com-

pliance with constitutional standards. Thus it can be seen that in Baltimore County, an informal, unwritten *ad hoc* "policy" of monitoring detainees is meaningless, and only serves to exacerbate the problem of suicides in police lockups.

B. There Is No Record Basis For Claiming That The Cover-Up Theory Was Rejected By The Jury

The respondents also incorrectly assert that the jury rejected petitioners' claim that the County and Chief Behan covered up the misconduct that led to Buffington's suicide (Opp. 5). The existence of a cover-up is revealed by the fact that Officers Gaigalas and Tucker engaged in extreme misconduct, and notwithstanding this extreme misconduct were exonerated by the Department instead of being disciplined. In other words, their extreme misconduct was covered-up. Thus it can be seen that the existence of a cover-up follows necessarily from the Department's failure to recognize the misconduct.

Merely because the jury did not return a verdict against Captain Kramer does not mean that the jury rejected the Buffingtons' cover-up theory.[3] On the contrary, the Buffingtons did, in fact, prove a cover-up of the police misconduct which caused their son's suicide, and the jury's verdict against Baltimore County and Chief Behan is entirely consistent with such proof. As instructed by the district court (Apx. 2248), a failure to conduct a thorough investigation into the Buffington suicide, and/or prior suicide episodes, may be used as evidence of an unconstitutional policy, maintained by Balti-

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[3] As instructed by the district court, Captain Kramer's liability was predicated on his responsibility for the safekeeping of suicidal detainees in custody at the Wilkens Precinct. (Apx. 2246). There is no support in the record for respondents' argument that Captain Kramer's liability was premised exclusively on his failure to expose and/or his concealment of his officers' wrongdoing. The jury could have simply determined that the proof as to Captain Kramer, personally, was not so egregious as to constitute deliberate indifference.

more County and Chief Behan, of non-supervision of police officers. *E.g., Fiacco v. City of Rensselear*, 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1384 (1987). Similarly, the jury was instructed (Apx. 2248-2249) that an active cover-up of extreme police misconduct could be used as evidence of an unconstitutional policy maintained by Baltimore County and Chief Behan towards suicidal detainees. *E.g., Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). Because the jury's verdict is entirely consistent with an acceptance of plaintiffs' proof of a cover-up, there is no basis for respondents' argument that the jury rejected this theory of liability. It is settled that "juries act in accordance with the instructions given them." *City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986) (per curiam). The jury was instructed on the cover-up theory, and an appellate court "must interpret the entire record in the light most favorable to [the prevailing party] and give to it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be reasonably drawn." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985). Thus there is no valid basis for claiming that this theory was rejected by the jury.

C. The Evidence Of Custom Was Wholly Ignored

As explained in the Buffingtons' Petition (Pet. at 19-24), the Fourth Circuit focused exclusively on the failure to train theory of liability and totally ignored the Buffingtons' additional evidence of unconstitutional custom. As recognized by the Third Circuit, "[a]s long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement *should be left to the jury.*" *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990) (emphasis added). In reversing a directed verdict entered for the city, the Third Circuit in *Bielevicz* stated as follows:

> [T]o sustain a § 1983 action against the City, plaintiffs must simply establish a municipal custom coupled with causation—i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, at least in part, led to their injury. If the City is shown to have tolerated known misconduct by police officers, the issue whether the City's inaction contributed to the individual officers' decision to arrest the plaintiffs unlawfully in this instance *is a question of fact for the jury.*

Id. at 851 (emphasis added). Thus the Third Circuit held that the question of causation was properly left to the jury.

In finding a lack of a jury question on causation in the instant case, the Fourth Circuit has in effect held that municipal liability cannot be established on the basis of an alternative theory of custom. The Fourth Circuit is therefore obviously in need of this Court's supervisory guidance as to the sufficiency of causation evidence when municipal liability is premised on alternative theories of failure to train and/or condoned custom.

II. LIABILITY AGAINST THE OFFICERS AND THE COUNTY IS NOT MUTUALLY EXCLUSIVE

Finally, respondents are mistaken in contending that the theories of liability against the officers and the County were mutually exclusive. Respondents argue:

> Petitioners' theories of individual and municipal liability were mutually exclusive: Officers' Gaigalas' and Tucker's failure to follow the customary precinct practice (of which they were both aware) of handcuffing suicidal detainees to the booking desk, and the County's failure to adopt a variety of suicide prevention programs, simply could not *both* be the 'moving force' behind James Buffington's death.

Opp. at 5-6 (emphasis original). Respondents suggest that there can be but one "moving force" behind James Buffington's death (Opp. 6).

Respondents have overlooked controlling precedent on this point. In *Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam), the Court held that a municipality could not be held liable under § 1983 unless there was an underlying constitutional violation by the municipality's police officers. In *Heller* the Court held that the jury's finding that the police officers inflicted no constitutional injury on the plaintiff eliminated any basis of liability aganst the city. The Court stated:

> [N]either *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations may have *authorized* the use of constitutionally excessive force is quite beside the point.

475 U.S. at 799 (emphasis original). Thus as a matter of logic and evidence, the moving force behind the failure to prevent the suicide of James Buffington was the unconstitutional policy and custom of the County *and* the deliberate indifference of the individual police officers acting pursuant to that policy and custom.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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